

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Joseph Czarnionka

v.

Civil No. 12-cv-417-JL

Carolyn W. Colvin, Acting
Commissioner, Social Security
Administration

REPORT AND RECOMMENDATION

Pursuant to 42 U.S.C. § 405(g), Joseph Czarnionka moves to reverse the Acting Commissioner's decision denying his application for Social Security disability insurance benefits, or DIB, under Title II of the Social Security Act, 42 U.S.C. § 423, and for supplemental security income, or SSI, under Title XVI, 42 U.S.C. § 1382. The Acting Commissioner, in turn, moves for an order affirming her decision. For the reasons that follow, I recommend that this matter be remanded to the Acting Commissioner for further proceedings consistent with this report and recommendation.

Standard of Review

The applicable standard of review in this case provides, in pertinent part:

The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment

affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive

42 U.S.C. § 405(g) (setting out the standard of review for DIB decisions); see also 42 U.S.C. § 1383(c)(3) (establishing § 405(g) as the standard of review for SSI decisions). However, the court "must uphold a denial of social security . . . benefits unless 'the [Commissioner] has committed a legal or factual error in evaluating a particular claim.'" Manso-Pizarro v. Sec'y of HHS, 76 F.3d 15, 16 (1st Cir. 1996) (quoting Sullivan v. Hudson, 490 U.S. 877, 885 (1989)).

As for the statutory requirement that the Commissioner's findings of fact be supported by substantial evidence, "[t]he substantial evidence test applies not only to findings of basic evidentiary facts, but also to inferences and conclusions drawn from such facts." Alexandrou v. Sullivan, 764 F. Supp. 916, 917-18 (S.D.N.Y. 1991) (citing Levine v. Gardner, 360 F.2d 727, 730 (2d Cir. 1966)). In turn, "[s]ubstantial evidence is 'more than [a] mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Currier v. Sec'y of HEW, 612 F.2d 594, 597 (1st Cir. 1980) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)). But, "[i]t is the responsibility of the [Commissioner]

to determine issues of credibility and to draw inferences from the record evidence. Indeed, the resolution of conflicts in the evidence is for the [Commissioner], not the courts.” Irlanda Ortiz v. Sec’y of HHS, 955 F.2d 765, 769 (1st Cir 1991) (citations omitted). Moreover, the court “must uphold the [Commissioner’s] conclusion, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence.” Tsarelka v. Sec’y of HHS, 842 F.2d 529, 535 (1st Cir. 1988). Finally, when determining whether the decision of the Acting Commissioner in this case is supported by substantial evidence, this court must “review[] the evidence in the record as a whole.” Irlanda Ortiz, 955 F.2d at 769 (quoting Rodriguez v. Sec’y of HHS, 647 F.2d 218, 222 (1st Cir. 1981)).

Background

The parties have submitted a Joint Statement of Material Facts (“Joint Statement”), document no. 16. That statement is part of the court’s record and will be summarized here, rather than repeated in full.

Czarnionka has not worked since July 18, 2006, the date on which he claims to have become disabled. Prior to that, he worked in construction, as a framer.

With respect to his physical condition, Czarnionka has been diagnosed with degenerative disc disease, disc herniation, disc

bulging, chronic severe L5 disc degeneration and disc bulge, disc bulging at L4-5, a central annular tear, mild spinal stenosis, degenerative changes at C5-6, bilateral hand paresthesias, annular bulging at the C5-6 and C6-7 levels, and degenerative disc disease with posterior soft-tissue protrusions at L4-5 and L5-S1. His treatment for those conditions has included physical therapy, exercise, injections, and medications including Cymbalta, Oxycodone, Tylenol #3, Darvocet, and Vicodin. That said, the ALJ's assessment of Czarnionka's physical capacity for work does not appear to be at issue.

With respect to his mental condition, Czarnionka has been diagnosed at various times with anxiety and depression. In early 2009, Dr. Lawrence Jasper, a clinical psychologist, was "authorized or contracted by the Disability Determination Services to examine [Czarnionka.]" Administrative Transcript ("Tr.") 516, and, on that basis, he performed a "Comprehensive Psychological Profile - Adult Examination" Tr. 510, on Czarnionka. Based upon that examination, and his review of various treatment records and other documents, Dr. Jasper made the following diagnosis:

Axis I: Major depressive disorder, chronic, moderate; Panic disorder without agoraphobia; Rule out Posttraumatic stress disorder in partial remission, arising from the combined effects of the violent death of

his natural father and the subsequent exposure to domestic violence.

Axis II: Deferred.

Axis III: As reviewed earlier in this report by the claimant; pain disorder due to multiple back problems described by the claimant.¹

Tr. 515.

In August of 2010, Czarnionka saw Cynthia Cahoon, D.N.P. for an initial evaluation. He presented with complaints of depression and anxiety. She made the following diagnoses, after conducting a mental status examination:

Axis I:
Mood disorder NOS (r/o Bipolar NOS, possibly mixed)
Anxiety disorder with panic attacks

Axis II:
Deferred

Axis III:
DDD [degenerative disc disease] with chronic pain

Axis IV:
Patient has problems with: primary support group, social environment, occupational, economic.²

¹ In the multiaxial assessment scheme described in the American Psychological Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") (4th ed. 2000), Axis I refers to "Clinical Disorders" and "Other Conditions That May Be a Focus of Clinical Attention," Axis II refers to "Personality Disorders" and "Mental Retardation," and Axis III refers to "General Medical Conditions." Id. at 27.

² Axis IV refers to "Psychosocial and Environmental Problems." DSM-IV-TR, supra note 1, at 27.

Axis V (Current GAF): 45³

Tr. 571.

Czarnionka's mental conditions have been treated with therapy and several medications including Zoloft⁴ (prescribed for anxiety), Cymbalta⁵ (prescribed for chronic pain and depression),

³ Axis V refers to a patient's "Global Assessment of Functioning." DSM-IV-TR, supra note 1, at 27. "A GAF score represents 'the clinician's judgment of the individual's overall level of functioning.'" Nickerson v. Astrue, No. 1:11-cv-87-GZS, 2012 WL 975641, at *2 n.2 (D. Me. Mar. 21, 2012) (quoting DSM-VI-TR, supra, at 32. "The GAF scale ranges from 100 (superior functioning) to 1 (persistent danger of severely hurting self or others, persistent inability to maintain minimal personal hygiene, or serious suicidal act with clear expectation of death)." Nickerson, 2012 WL 975641, at *2 n.2 (citation omitted). A GAF score of 41 to 50 indicates: "**Serious symptoms** (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) **OR any serious impairment in social, occupational, or school functioning** (e.g., no friends, unable to keep a job)." DSM-IV-TR, supra, at 34 (emphasis in the original). However, "[t]he Commissioner [of Social Security] has declined to endorse the GAF scale for use in the Social Security and SSI disability programs and has indicated that GAF scores have no direct correlation to the severity requirements of the mental disorders listings." Holliday v. Astrue, No. 5:12cv143-CAS, 2013 WL 105322, at *7 (N.D. Fla. Jan. 8, 2013) (quoting Wind v. Barnhart, 133 F. App'x 684, 692 n.5 (11th Cir. 2005); citing 65 Fed. Reg. 50746, 50764-65 (Aug. 21, 2000)) (internal quotation marks omitted).

⁴ Zoloft is a "trademark for preparations of sertraline hydrochloride." Dorland's Illustrated Medical Dictionary 2120 (31st ed. 2007). Sertraline hydrochloride is "a selective serotonin reuptake inhibitor, used to treat depressive, obsessive-compulsive, and panic disorders." Id. at 1724.

⁵ Cymbalta is a "trademark for a preparation of duloxetine hydrochloride." Dorland's, supra note 4, at 465. Duloxetine hydrochloride is "a serotonin-norepinephrine reuptake inhibitor,

Diazepam⁶ (prescribed for agitation and mood swings), and Wellbutrin.⁷

In December of 2008, Colleen Mahoney, a social worker, completed a Mental Impairment Questionnaire on Czarnionka, and gave the following impressions of his abilities to function:

- 1) Daily Activities:
Unable to sit or stand for prolonged periods because of back pain.
- 2) Social Interactions:
Little to none outside of family.
- 3) Task Performance:
Limited by medical problems.
- 4) Stress Reaction:
Impaired - Becomes angry, impatient, difficulty with w/self regulation and soothing.

Tr. 509.

After conducting his consultative examination in January of 2009, Dr. Jasper provided the following assessment of Czarnionka's then current level of functioning:

A. Understanding and Memory: He is able to understand and remember detailed instructions.

used for the treatment of major depressive disorder"
Id. at 580.

⁶ Diazepam is "a benzodiazepine used as an antianxiety agent in the treatment of anxiety disorders and for short-term relief of anxiety symptoms" Dorland's, supra note 4, at 519.

⁷ Wellbutrin is a "trademark for a preparation of bupropion hydrochloride." Dorland's, supra note 4, at 2107. Bupropion hydrochloride is "a monocyclic compound structurally similar to amphetamine, used as an antidepressant" Id. at 265.

B. Social Functioning: Despite impairments, he is able to interact appropriately and communicate effectively with family members, neighbors, and landlord. However, he is not able at this time to interact with friends or fellow employees. This is largely due to the significant underlying agitation.

C. Concentration and Task Completion: From a psychological standpoint, he is able to sustain attention and to complete short and simple tasks.

D. Adaptation to Work and Work-Like Situations: From a psychological standpoint, the claimant is able to tolerate stresses associated with the work setting as they pertain to decision making, attendance, and schedules, but not interaction with supervisors as there are significant problems with dealing with authority figures and significant underlying agitation.

Tr. 514 (emphasis added).

In February of 2009, Dr. Craig Stenslie completed a Psychiatric Review Technique form on Czarnionka. In it, he determined that Czarnionka had a depressive syndrome characterized by: (1) psychomotor agitation or retardation; (2) decreased energy; (3) feelings of guilt or worthlessness; and (4) difficulty concentrating or thinking. See Tr. 528. He also opined that Czarnionka had moderate restrictions in his activities of daily living, marked difficulties in maintaining social functioning, marked difficulties in maintaining concentration, persistence or pace, and had one or two episodes of decompensation, each of extended duration. Those findings, in turn, are sufficient to meet the definition of affective

disorders set out in the Listing of Impairments used by the Social Security Administration to determine whether a claimant is disabled. See 20 C.F.R. § 404, Subpt. P, App. 1, Listing 12.04.⁸ Medical consultant G.R. Ibarra completed a form indicating his agreement with Dr. Stenslie's assessment.

In July of 2010, Ms. Mahoney completed a Medical Source Statement of Ability to Do Work-Related Activities (Mental) for Czarnionka. With regard to understanding, remembering, and carrying out instructions, Ms. Mahoney noted no restriction in Czarnionka's abilities to: (1) carry out simple instructions; and (2) make judgments on simple work-related decisions. She noted mild restrictions in his abilities to: (1) remember simple instructions; (2) remember complex instructions; (3) carry out complex instructions; and (4) make judgments on complex work-related decisions.⁹ With regard to interacting with supervisors, co-workers, and the public, and responding to changes in the routine of the workplace, she noted a mild restriction in his ability to interact appropriately with the public and moderate restrictions in his abilities to: (1) interact appropriately

⁸ As the court explains more fully in the next section, if a claimant has an impairment that meets the definition of a listed impairment, he is disabled for the purpose of establishing eligibility for Social Security benefits.

⁹ The scale of restrictions on the form Mahoney completed is this: none, mild, moderate, marked, and extreme. Tr. 553.

with supervisors; (2) interact appropriately with co-workers; and (3) respond appropriately to usual work situations and changes in a routine work setting. Ms. Mahoney also noted that no other abilities were affected by Czarnionka's mental condition.

This case has had a long and complicated procedural history, some of which is relevant to Czarnionka's current appeal. In February of 2009, the state agency that reviews social security disability claims determined that Czarnionka "had severe mental impairments that met the level of severity in Sections 12.04 and 12.06 of the Listings of Impairments (Appendix 2 to Subpart P, Regulations No. 4)." Tr. 333. In an order dated April 23, 2010, the Decision Review Board ("DRB") of the Social Security Administration's Office of Disability Adjudication and Review found that

[t]he current evidence [did] not support the presence of any listing level mental impairment when considering the clinical findings of the above-mentioned consultative psychological evaluation [i.e., the one conducted by Dr. Jasper] and given the absence of a longitudinal record reflecting treatment for emotional complaints.

Tr. 334. On that basis, the DRB remanded the case to an ALJ, with instructions that the ALJ: (1) "[o]btain additional evidence concerning the claimant's mental and physical impairments," id.; (2) "[e]valuate the claimant's mental

impairments in accordance with the special technique described in 20 CFR 404.1520a and 416.920a," id.; (3) "[g]ive further consideration to the claimant's maximum residual functional capacity and provide appropriate rationale with specific references to evidence of record in support of the assessed limitations," id.; and (4) "[o]btain evidence from a medical expert to clarify the nature and severity of the claimant's mental impairments," id.

On remand, the ALJ conducted a hearing during which he took testimony from a vocational expert ("VE") and from Dr. Alfred Jonas, who is a board-certified psychiatrist. Based upon his review of the record, Dr. Jonas provided several different opinions, including his opinion that Dr. Jasper's psychological profile did not support a determination that Czarnionka's mental impairment meets or equals Listing 12.04, due to a lack of evidence to support a finding that the "paragraph B criteria"¹⁰ are satisfied. While Dr. Jonas testified extensively about whether Czarnionka's mental impairment met or equaled the severity a listing, he does not appear to have offered any

¹⁰ The "paragraph B criteria" for the three impairments Dr. Jonas mentioned are measurements of the severity of those impairments, and involve four factors: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) episodes of decompensation. See 20 C.F.R. § 404, Subpt. P, App. 1, Listings 12.04, 12.06 & 12.08.

opinion on either Czarnionka's mental RFC or Dr. Jasper's opinion concerning Czarnionka's level of mental functioning.

After the hearing, the ALJ issued a decision that includes the following relevant findings of fact and conclusions of law:

3. The claimant has the following severe impairments: degenerative disc disease lumbar spine and cervical spine and a personality disorder (20 CFR 404.1520(c) and 416.920(c)).

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4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).

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5. After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) allowing for standing and walking for six hours; sitting six hours; and unlimited use of the upper and lower extremities.

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6. The claimant is unable to perform any past relevant work (20 CFR 404.1565 and 416.965).

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10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform (20 CFR 404.1569, 404.1569(a), 416.969, and 416.969(a)).

Tr. 318, 319, 320, 323. Based upon the testimony of the VE, the ALJ determined that Czarnionka could work as a collator

operator, as a cashier, as a marker, as a telemarketer, as a "clerical," and as a document preparer. The VE initially gave that testimony in response to a hypothetical question from the ALJ that incorporated the RFC assessment quoted above.

Thereafter, the VE testified that Czarnionka could perform those same jobs in response to a hypothetical question that posited the following limitations related to mental-health conditions:

[H]e's able to function with no limitations with regard to carrying out simple instructions or making judgments on simple instructions. Mild impairment with regard to remembering simple instructions. Mild impairment with regard to remembering complex instructions and mild impairment with carrying out complex instructions and making decisions on complex instructions. He has mild impairment in interacting with public and moderate impairment with interacting with co-workers and supervisors and responding appropriately to usual work situations and changes in a routine setting.

Tr. 639. After the VE responded to the foregoing hypothetical, the VE offered the following testimony:

Q If we assume - if we're basing off the fourth hypothetical that was just discussed - if instead, you assume that that person were not able to interact appropriately with fellow employees or supervisors due to underlying agitation, how would that affect your opinion?

A So, you saying that there would be a marked or -

Q Well, let's start with moderate.

A Moderate with co-workers and supervisors.

Q Correct.

A That - well, that was what was included in the judge's hypothetical.

Q Oh, I heard that as mild. What if [he] changed it to marked?

A If it were marked, then there would be no job.

Tr. 640-41.

Discussion

According to Czarnionka, the ALJ's decision should be reversed, and the case remanded, because the ALJ: (1) erroneously determined that his mental impairment did not meet or equal a listing, and did so by giving inappropriate weight to the opinion of Dr. Jonas; and (2) rendered an RFC assessment that is not substantially supported by the evidence and is internally inconsistent. See Cl.'s Mem. of Law (doc. no. 12-1) 4-5. The court agrees with Czarnionka that the ALJ's RFC assessment is fatally flawed. Thus, there is no need to address Czarnionka's challenge to the ALJ's step-three determination.

A. The Legal Framework

To be eligible for disability insurance benefits, a person must: (1) be insured for such benefits; (2) not have reached retirement age; (3) have filed an application; and (4) be under a disability. See 42 U.S.C. §§ 423(a)(1)(A)-(D). To be eligible for supplemental security income, a person must be

aged, blind, or disabled, and must meet certain requirements pertaining to income and assets. See 42 U.S.C. § 1382(a). The question in this case is whether Czarnionka was under a disability.

For the purpose of determining eligibility for disability insurance benefits,

[t]he term "disability" means . . . inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 423(d)(1)(A); see also 42 U.S.C. § 1382c(a)(3)(A)

(setting out a similar definition of disability for determining eligibility for SSI benefits). Moreover,

[a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. . . .

42 U.S.C. § 423(d)(2)(A) (pertaining to DIB); see also 42 U.S.C. § 1382c(a)(3)(B) (setting out a similar standard for determining eligibility for SSI benefits).

To decide whether a claimant is disabled for the purpose of determining eligibility for either DIB or SSI benefits, an ALJ

is required to employ a five-step process. See 20 C.F.R. §§ 404.1520 (DIB) & 416.920 (SSI).

The steps are: 1) if the [claimant] is engaged in substantial gainful work activity, the application is denied; 2) if the [claimant] does not have, or has not had within the relevant time period, a severe impairment or combination of impairments, the application is denied; 3) if the impairment meets the conditions for one of the "listed" impairments in the Social Security regulations, then the application is granted; 4) if the [claimant's] "residual functional capacity" is such that he or she can still perform past relevant work, then the application is denied; 5) if the [claimant], given his or her residual functional capacity, education, work experience, and age, is unable to do any other work, the application is granted.

Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001) (citing 20 C.F.R. § 416.920).

The claimant bears the burden of proving that he is disabled. See Bowen v. Yuckert, 482 U.S. 137, 146 (1987). He must do so by a preponderance of the evidence. See Mandziej v. Chater, 944 F. Supp. 121, 129 (D.N.H. 1996) (citing Paone v. Schweiker, 530 F. Supp. 808, 810-11) (D. Mass. 1982)). Finally,

[i]n assessing a disability claim, the [Commissioner] considers objective and subjective factors, including: (1) objective medical facts; (2) [claimant]'s subjective claims of pain and disability as supported by the testimony of the [claimant] or other witness; and (3) the [claimant]'s educational background, age, and work experience.

Mandziej, 944 F. Supp. at 129 (citing Avery v. Sec'y of HHS, 797 F.2d 19, 23 (1st Cir. 1986); Goodermote v. Sec'y of HHS, 690 F.2d 5, 6 (1st Cir. 1982)).

B. Czarnionka's Argument

With respect to the ALJ's RFC assessment, Czarnionka argues that: (1) once the ALJ determined that his mental impairment was severe at step two, he was obligated to incorporate a mental limitation into his RFC; and (2) the ALJ failed to properly evaluate the medical evidence. Czarnionka's first argument is incorrect. See Hines v. Astrue, No. 11-cv-262-PB, 2012 WL 2752192, at *9 (D.N.H. July 9, 2012). His second argument, however, is meritorious.

Czarnionka devotes the lion's share of his memorandum of law to describing evidence that, in his view, the ALJ erred by overlooking when making his step-three determination and fashioning his RFC assessment. Among other evidence, Czarnionka points to Dr. Jasper's opinions that he was "not able . . . to interact with friends or fellow employees," Tr. 514, and was unable "to tolerate . . . interaction with supervisors," id.

In the discussion of opinion evidence in the section of his decision devoted to his RFC assessment, the ALJ explained that he: (1) gave the most weight to Dr. Jonas's opinion concerning Czarnionka's mental condition; (2) gave significant weight to a

Physical Residual Functional Capacity Assessment made by Dr. Burton Nault in February of 2009; (3) gave relatively less weight to a Physical Residual Functional Capacity Assessment made by Dr. Jonathan Jaffe in January of 2007 and a Medical Source Statement of Ability to Do Work-Related Activities (Physical) provided by Dr. Avigdor Niv in July of 2007; (4) gave limited weight to Ms. Mahoney's opinion on Czarnionka's mental functional capacity; and (5) gave no weight to either the opinion in Dr. Stenslie's Psychiatric Review Technique form or Dr. Ibarra's concurrence with Dr. Stenslie's opinion. The ALJ, however, made no mention of Dr. Jasper's opinions concerning Czarnionka's inability to interact with fellow employees and supervisors, which was articulated under the heading "Current Level of Functioning" in the Comprehensive Psychological Profile that resulted from the consultative examination that Dr. Jasper performed at the request of Disability Determination Services. That is a problem.

As a general matter, the Social Security Administration is required to consider and evaluate every medical opinion it receives. See 20 C.F.R. §§ 404.1527(b)&(c) & 416.927(b)&(c). More specifically, when assessing a claimant's RFC, an ALJ "must always consider and address medical source opinions [and] [i]f the [ALJ's] RFC assessment conflicts with an opinion from a

medical source, the [ALJ] must explain why the opinion was not adopted." Social Security Ruling ("SSR") 96-8p, 1996 WL 274184, at *7 (S.S.A. 1996). Here, the importance of addressing Dr. Jasper's opinion is underscored by two additional factors. First, the DRB's remand order directed the ALJ to assess Czarnionka's RFC in accordance with specific Social Security regulations that point out, among other things, that "[a] limited ability to carry out certain mental activities, such as limitations in . . . responding appropriately to supervision [and] co-workers . . . may reduce [a claimant's] ability to do past work and other work," 20 C.F.R. §§ 404.1545(c) & 416.945(c). Second, at Czarnionka's hearing, the VE testified that a person with a markedly impaired ability to interact with co-workers and supervisors, i.e., a mental limitation consistent with the one posited by Dr. Jasper, would not be able to perform any jobs in the national economy.

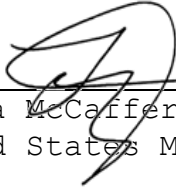
But, as noted, the ALJ said nothing about Dr. Jasper's opinion in the context of his RFC assessment and, necessarily, did not explain why he declined to adopt it. To be fair, the ALJ did mention Dr. Jasper's opinion in the section of his decision devoted to step three: "Dr. Jonas testified that the findings and opinions of Lawrence G. Jasper, PhD (Exhibit 23F) did not support the conclusion that the claimant's mental health

condition met Listing 12.04." Tr. 319. But, whether Dr. Jasper's opinion supports a determination that Czarnionka's mental-health condition meets a listing says nothing about the weight that should be accorded to Dr. Jasper's opinions regarding Czarnionka's abilities to interact with co-workers and supervisors. See Fortin v. Astrue, No. 10-cv-441-JL, 2011 WL 2295171, at *8 (D.N.H. May 18, 2011), report and recommendation approved, 2011 WL 2224771 (D.N.H. June 7, 2011). Thus, Dr. Jonas's opinion about Dr. Jasper's opinion did not relieve the ALJ of his obligation to evaluate Dr. Jasper's opinion of Czarnionka's mental functional capacity. The ALJ's failure to evaluate Dr. Jasper's opinion on Czarnionka's functional capacity is an error that requires remand. See Costa v. Astrue, No. 1:09-cv-441-JL, 2010 WL 4365868, at *7 (D.N.H. Nov. 3, 2010).

Conclusion

For the reasons detailed above, I recommend that: (1) the Acting Commissioner's motion for an order affirming her decision, document no. 14, be denied; and (2) Czarnionka's motion to reverse the decision of the Acting Commissioner, document no. 12, be granted to the extent that the case is remanded to the Acting Commissioner for further proceedings, pursuant to sentence four of 42 U.S.C. § 405(g).

Any objections to this report and recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011), cert. denied, 132 S. Ct. 1045 (2012); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (only issues fairly raised by objections to magistrate judge's report are subject to review by district court; issues not preserved by such objection are precluded on appeal).



Landya McCafferty
United States Magistrate Judge

July 19, 2013

cc: Jared P. O'Connor, Esq.
Robert J. Rabuck, Esq.